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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 ARMANDO F. ESPOSO,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting  
12 Commissioner of Social Security  
Administration,

13 Defendant.

CASE NO. 16-1574 RJB BAT

ORDER ADOPTING REPORT AND  
RECOMMENDATION

14 This matter comes before the Court on the Report and Recommendation of U.S.  
15 Magistrate Judge Brian A. Tsuchida. Dkt. 14. The Court has reviewed the Report and  
16 Recommendation, Defendant's Objections to the Report and Recommendation, and the  
remaining record.

17 Plaintiff filed this case challenging the denial of his application for Supplemental  
18 Security Income benefits. Dkt. 1. On May 31, 2017, a Report and Recommendation was filed,  
19 recommending that the case be remanded to the Social Security Administration for further  
20 proceedings. Dkt. 14. The Commissioner filed objections and the Plaintiff filed a reply to those  
21 objections. Dkts. 15 and 16. The facts are in the Report and Recommendation and are adopted  
22 here. Dkt. 14.

23 The Report and Recommendation (Dkt. 14) should be adopted and the case remanded to  
24 the Commissioner for further proceedings. The Commissioner's objections are generally a

1 recitation of her prior arguments. The Report and Recommendation recommends that the Court  
2 find that the ALJ failed to adequately assess the medical opinion of consultative examiner Daniel  
3 Phan, M.D.’s finding that Plaintiff “should use supportive hose and elevate his leg regularly to  
4 minimize swelling.” Dkt. 14. The Commissioner objects, asserts that it was not error because  
5 the ALJ found Mr. Esposito should have breaks and he could elevate his legs during breaks, and  
6 even if it was the error, the error was harmless. Dkt. 15.

7 As stated in the Report and Recommendation, the Commissioner’s post-hoc  
8 rationalizations (that Mr. Esposito’s could elevate his legs during breaks) are improper and this  
9 Court cannot rely on them. Dkt. 14, at 4 (*citing Pinto v. Massanari*, 249 F.3d 840, 847-48 (9th  
10 Cir. 2001)). Further, considering the record as a whole, the undersigned cannot find that the error  
11 was harmless, particularly considering the other errors.

12 The Report and Recommendation urges the Court to find that the ALJ erred in failed to  
13 discuss the state agency consultants Drs. Robinson and Eather’s opinions that “[s]upervisor  
14 criticism should be delivered [to Mr. Esposito] in a non-threatening manner.” Dkt. 14, at 4-5. The  
15 Commissioner asserts that these opinions were recommendations that the ALJ need not address  
16 and are wholly consistent with the residual functional capacity (“RFC”). Dkt. 15. As stated in  
17 the Report and Recommendation, the doctors’ use of the word “should” does not “suggest  
18 something short of an imperative.” Dkt. 14, at 5 (*citing Carmickle v. Comm’r of Social Sec.*  
19 *Admin.*, 533 F.3d 1155, 1165 (9th 2008)). The Commissioner asserts that, in any event, the  
20 opinions are merely that Mr. Esposito’s supervisors should conduct themselves in accord with  
21 workplace norms. Dkt. 15, at 5. This argument is, again, post hoc rationale. The ALJ failed to  
22 discuss this limitation, include it in Mr. Esposito’s RFC, or in the hypothetical questions posed to  
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1 the vocational expert; he certainly did not make any findings regarding workplace norms. This  
2 objection is not a basis to reject the Report and Recommendation.

3 The Report and Recommendation also recommends that the Court find that the ALJ  
4 improperly assessed the opinions of Ms. St. Jacques regarding Mr. Esposito's ability to take  
5 direction from and respond to criticism from supervisors. Dkt. 14. The Commissioner argues  
6 that as an "other source" opinion, (she was his treating counselor), the ALJ's finding that there  
7 was no objective evidence to support the finding, was "germane" which is sufficient. Dkt. 15.  
8 These arguments are addressed in the Report and Recommendation and do not provide a basis to  
9 reject it.

10 The Report and Recommendation (Dkt. 14) should be adopted. The Commissioner's  
11 decision should be reversed and the case remanded to the Social Security Administration for  
12 further proceedings consistent with this opinion.

13 It is **ORDERED** that:

- 14 • The Report and Recommendation (Dkt. 14) **IS ADOPTED**;
- 15 • The decision of the Commissioner **IS REVERSED**, and the case **IS**  
16 **REMANDED** pursuant to sentence four of 42 U.S.C. § 405 (g) to the Social  
17 Security Administration for further proceedings.

18 The Clerk is directed to send uncertified copies of this Order to Judge Tsuchida, all  
19 counsel of record and to any party appearing pro se at said party's last known address.

20 Dated this 10<sup>th</sup> day of July, 2017.

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23 ROBERT J. BRYAN  
24 United States District Judge